Appeal from appellate decree no. 642 of 1986

Against the judgment and decree dated 14.7.1986 passed by Sri Bharat Prasad Sharma, 4th Additional District Judge, Gaya in Money Appeal No. 2 of 1984/7 of 1981 affirming the judgment and decree dated 8.6.1981 passed by Sri Laxman Ram, Additional Munsif 2nd, Gaya in M.S.No.20 of 1980.

Imranuddin Khan and Others …….. ……. Appellants

Versus

Waris Imam …… …….. ……. Respondent.

For the Appellants : M/s Ravindra Kumar Sinha,
Rajeshwar Singh and
Mahesh Prasad Advocates.

For the Respondent; None.

P R E S E N T

THE HON'BLE MR.JUSTICE GHANSHYAM PRASAD

Ghyanshyam Prasad, J

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This Second Appeal has been preferred by the defendants against the judgment and decree dated 14.7.1986 passed by the 4th Additional District Judge, Gaya in Money Appeal No.2 of 1984/ 7 of 1981. The learned Additional District Judge vide above judgment has dismissed the appeal and confirmed the judgment and decree dated 8.6.1981 passed by the Additional Munsif II, Gaya in Money Suit No. 20/1980/62/1978.

2. The facts leading to this Second Appeal are as follows; The appellants were defendants in the aforesaid suit. The plaintiff-respondent was a practicing Advocate at Gaya. He filed the suit against the defendant no.1 and his brother-in-law as original defendant no.2, Wazhat Hussain Khan, who was retired Sub-Inspector of police, for damages and compensation to the tune of Rupees one thousand along with some other reliefs. The suit was

ultimately decreed on contest.

3. During the pendency of the suit the original defendant no.2 died and on his place his heirs were substituted as defendant nos. 2(a) to 2(c), who are appellants in this appeal as appellant nos.2 to 4. The defendants preferred the appeal against the judgment of lower court which was also dismissed. Thereafter, the instant Second Appeal has been filed.

4. The case of the plaintiff-respondent in short is that he was a practicing Advocate commanding respect in the society. One Moinuddin Khan was tenant in one of the houses of original defendant no.2. There were several litigations between them including one under House Control Act in which plaintiff was working against the defendant. Being aggrieved by it, both defendants in collusion and conspiracy with each other got one first information lodged by the defendant no.1 against the plaintiff and others before Kotwali police station on 16.2.1975 with false and concocted allegations. The defendant no.2 being retired police personnel influenced the investigation and got the charge-sheet submitted against the plaintiff and three others under Sections 379 and 323/109 of the Indian Penal Code. Ultimately the plaintiff was put on trial. However, the trial ended in clean acquittal of the plaintiff. It is alleged that the plaintiff during the trial suffered mental and monetary loss and also loss of prestige as a result of false implication in criminal case. The total damage was assessed and estimated to the tune of rupees one thousand.

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5. Two sets of written statements were filed, one on behalf

of the defendant no.1 and other on behalf of heirs of original defendant no.2 i.e. defendants nos.2 (a) to 2 (c) . The case of defendant no.1 is that the plaintiff actively participated in instigation of other accused persons to assault and rob him and, therefore, first information report was lodged against the plaintiff also. He denied about collusion and conspiracy with original defendant no.2. He also denied about any bad motive or ill will to lodge the first information report. It has been averred that the first information report was lodged with true facts. The plaintiff was not cleanly acquitted. He was given benefit of doubt. He also denied about any monetary loss. According to him, the plaintiff being lawyer himself conducted his case and they did not suffer any monetary loss.

6. The other defendants while adopting the written statement of defendant no.1 denied that Moinuddin was ever tenant in any house of defendant no.2.He also denied that defendant no.2 had anything in lodging criminal case by defendant no.1. The defendant no.1 filed criminal case with true facts. The original defendant no.2 after retirement had no influence on the police department nor did he get the case diary of the case manipulated. The police properly investigated the case and submitted charge-sheet against the plaintiff and others.

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7. The learned trial court framed as many as seven issues. However, the suit was decreed on the basis of findings on issue no. 6, which runs as follows;

"Was the criminal proceeding launched against the plaintiff by defendant no.1 bonafide and in good faith?"

8. The learned trial court after considering oral and documentary evidence as also decision of High Courts held that the plaintiff has proved the case of malicious prosecution against defendant no.1. There is no finding against defendant no.2 or his heirs. However, the suit was decreed as a whole against the defendants, meaning thereby, against all defendants.

9. The defendants preferred the appeal before the District Judge which was ultimately heard by 4th Additional District Judge, Gaya who dismissed the appeal and confirmed the judgment and decree of lower court. The learned Additional District Judge also did not notice that actually suit had been decreed against only defendant no.1 and not against the heirs of original defendant no.2.

10. At the time of Admission of Second Appeal the following substantial questions of law for hearing the appeal were formulated;

(i) Whether the cause of action survived after the death of original defendantno.2 and as to whether his heirs could be substituted, who are appellant nos.2 to 4;

(ii) Whether the judgment under appeal is vitiated on account of non-consideration of the oral evidence."

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Heard the learned counsel for the appellants. This Court did not get opportunity of getting assistance from the learned counsel for the respondent as in spite of several opportunities given to them no-one turned up to argue on behalf of the respondent.

11. In course of argument learned counsel for the appellants challenged the judgment of both the courts on various grounds. However, the main submission is that in the facts and

circumstances of the case the lower court had erred to hold that the prosecution of plaintiff by defendant no.1 was malicious and without any reasonable and probable cause. The other submission is that damages are personal liability in nature, and, therefore, after the death of wrong doer the suit abates against him and no decree can be passed against his hers. It is submitted that both courts have erred to pass decree against the heirs of original defendant no.2 i.e. appellant nos.2 to 4.

Point No.II

12. There are certain admitted facts in this case. It is admitted that the defendant no.1 is brother-in-law (Sala) of original defendant no.2. There was litigations between original defendant no.2 and one Moinuddin. The plaintiff-respondent was lawyer of Moinuddin in one of the case against defendant no.2. It is also admitted that defendant no.1 lodged first information report against the plaintiff-respondent in Kotwali police station. The defendant no.1 himself claimed to be the victim of assault etc. It is also admitted that the plaintiff-respondent was put on trial and was ultimately acquitted by the trial court.

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13. In order to succeed in a suit for malicious prosecution the plaintiff has to prove (i) that there was want of reasonable and probable cause for launching prosecution (ii) that the prosecution was initiated in malicious spirit and (iii) that proceeding ended in acquittal of the plaintiff.

14. Ext. 3 is the certified copy of the judgment dated 29.8.1977 passed in G.R.Case No.345 of 1977/678 of 1977. The

plaintiff-respondent was one of the accused. The defendant appellant no.1, Imrauddin was the informant. Ext. 3 would go to show that all accused persons including the plaintiff- respondent have been acquitted by the learned Magistrate.

15. The first ingredient is the most important. There is concurrent finding on this point. Both the courts below have held that there was want of reasonable and probable cause for prosecution of the plaintiff-respondent. For that conclusion they have discussed and considered oral as well as other materials. Learned counsel for the appellants failed to show any perversity in the findings.

16. Apart from it, the admitted facts itself are sufficient to show want of reasonable and probable cause for prosecution. The defendant no.1 is brother-in-law (Sala) of original defendant no.2, who was ex-police officer and had litigation with Moinuddin. The palaintiff-respodnent was lawyer of Moinuddin .After full fledged trial the plaintiff-respondent was acquitted on merit by the learned Magistrate. Therefore, there is strong presumption with regard to absence of reasonable and probable cause for prosecution. Here I am tempted to refer a decision of this Court on this point which is reported in **1968 BLJR 441 (Satdeo Prasad and another Vs. Ram Narayan @ Kalu Dusadh and Others).** Paragraphs 11 and 13 of the Judgment are relevant which run as follows;

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" Para 11- On a review of the cases above mentioned, the principles therefore, which emerge and which would apply here may be summarized thus;

When the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true , in such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or, if the

circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to inter that if the accused is innocent there must have been a want of reasonable and probable cause. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. Where, therefore, the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit, and the trial ends in an acquittal on the merits as is the case here, the presumption will be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation.

Para-13- The malice which is essential in an action for malicious prosecution does not necessarily connote personal spite or ill-will but motive rather than a desire to vindicate the law."

17. In course of argument learned counsel for the appellants submitted that the plaintiff-respondent was not cleanly acquitted. He was given benefit of doubt. Therefore, the prosecution cannot be said to be malicious and without reasonable and probable cause.

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18. On perusal of Ext.3 it would appear that in concluding paragraph 32 the learned Magistrate has written that the accused persons are given benefit of doubt and hence acquitted. However, on perusal of the entire judgment it would appear that the entire story of prosecution as well as evidence of the informant (defendant no.1), who claims to be eye witness, has been disbelieved. In this respect paragraphs 11 to 17 of the judgment are relevant in which evidence of the informant has been fully discussed. In a case reported in **AIR 1974 Allahabad 129 (Abdul Majid Versus Habansh chaube and others.)** this matter has been considered in paragraph 7, which runs as follows;

"Para 7- Learned counsel for the appellant further argued that the plaintiff was given benefit of doubt by the

Sessions Judge and, therefore, it was not a case of clean acquittal. This contention has also no merits. The fact remains that the plaintiff was acquitted of the charges. The fact also remains that the plaintiff was prosecuted. The Civil Court had in the suit which gave rise to the present appeal, to examine the evidence on the record and to come to its own conclusion whether there was any reasonable or probable cause for the defendants to prosecute the plaintiff. Both the courts below after examining the evidence adduced by the parties recorded a finding that there was no reasonable and probable cause for the prosecution of the plaintiff and that the whole thing was concocted."

19. Thus from the above discussion. it is quite clear that both courts have properly considered all materials and have rightly held that there was no reasonable and probable cause for prosecution rather it was maliciously instituted against the plaintiff-respondent Thus point no.2 is answered accordingly.

Point No.1-

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20. Appellant Nos.2 to 4 are heirs of original defendant no.2. They were added as defendants at the trial stage in place of original defendant no.2. This Court has already noticed that the trial court on facts found the case true only against defendant no.1 and not against defendant no.2 or his heirs but inadvertently the court passed the order against all defendants. The learned appellate court also did not notice this fact and confirmed the judgment of the lower court. Thus, it is quite clear that the judgment and decree passed against appellant nos.2 to 4 is liable to be set aside.

21. Apart from it, the maxim 'Actio personalis Moritur Cum Persona' is applied in the action for tort. It means the death of wronged or wrong doer puts an end to the cause of action. Therefore, the suit will abate on the death of either party during its

pendency.

22. In this case the defendant no.2 died during the pendency of the suit. Appellant nos. 2 to 4 were substituted on his place. The suit was filed for damages on the ground of malicious prosecution .It is purely personal liability. In view of the aforesaid maxim cause of action for damages, so far it relates to original defendant no.2, abated with his death. His heirs cannot be held liable to pay any damage for malicious prosecution.

22. In view of the above discussion point no.1 is decided in favour of appellants i.e. appellant nos.2 to 4.

23. In the result, this Second Appeal is allowed in favour of appellant Nos.2 to 4 and dismissed against appellant no.1. However, there shall be no order as to costs.

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Patna High Court **(Ghyanshyam Prasad, J)**
Dated July 15,2008
NAFR/B.Jha